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### Relaxing the Noose Around Tying Arrangements: *Reifert v. South Central Wisconsin MLS Corp.* Exposes Problems with the *Per Se* Analysis

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**RELAXING THE NOOSE AROUND TYING  
ARRANGEMENTS: *REIFERT V. SOUTH CENTRAL  
WISCONSIN MLS CORP.* EXPOSES PROBLEMS  
WITH THE *PER SE* ANALYSIS**

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INTRODUCTION

The U.S. Supreme Court defined the elements for *per se* condemnation of tying arrangements in *Jefferson Parish Hospital District No. 2 v. Hyde*<sup>1</sup> and reaffirmed the *Jefferson Parish* majority's framework in its recent *Illinois Tool Works, Inc. v. Independent Ink, Inc.* decision.<sup>2</sup> Shortly after *Jefferson Parish*, however, the Seventh Circuit modified the Supreme Court's test by adding an entirely separate element, the "economic interest requirement," that plaintiffs must show for the court to condemn a tying arrangement as illegal *per se*.<sup>3</sup> Subsequently, the Seventh Circuit rethought this revision of

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<sup>1</sup> 466 U.S. 2 (1984)

<sup>2</sup> 126 S.Ct. 1281 (2006) (concluding that tying arrangements involving patents "should be evaluated under the standards applied in . . . *Jefferson Parish*").

<sup>3</sup> *Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203 (7th Cir. 1985).

Supreme Court doctrine, and criticized the implementation of the economic interest requirement under the *Jefferson Parish per se* tying framework.<sup>4</sup>

In June 2006, however, Judge Flaum's majority opinion in *Reifert v. South Central Wisconsin MLS Corp.* reasserted the economic interest requirement as a prerequisite to finding a tying arrangement illegal *per se*.<sup>5</sup> Concurring in *Reifert's* outcome, Judge Wood explained that the majority was improperly anticipating the Supreme Court's overruling of prior precedent.<sup>6</sup> This Comment analyzes the propriety of the economic interest requirement in the Supreme Court's *per se* tying analysis and concludes that the *Jefferson Parish* majority does not endorse its implementation as a requisite for a tying violation. Additionally, the Supreme Court's *per se* tying analysis's ability to achieve the goals of an antitrust *per se* standard is examined, resulting in a prediction that the *per se* analysis will be abandoned in the future.

The *per se* analysis in tying arrangements is not as straightforward as the *per se* analysis in other areas of antitrust law.<sup>7</sup> As a result, this Comment begins in Part I with an essay into the history of the Supreme Court's treatment of tying arrangements and the circuit courts' implementation of the economic interest requirement into the *per se* tying analysis. It continues in Part II with an explanation of the majority and concurring analyses of tying arrangements in the Seventh Circuit's recent *Reifert* decision. Part III examines in detail the arguments favoring and condemning the implementation of the economic interest requirement in a *per se* tying analysis and concludes that the requirement should not be used as a prerequisite for *per se* illegality of a tying arrangement under existing Supreme Court doctrine. Finally, Part IV analyzes the efficacy of the *per se* standard

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<sup>4</sup> *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712 (7th Cir. 1987).

<sup>5</sup> 450 F.3d 312 (7th Cir. 2006)

<sup>6</sup> *Id.* at 323 (Wood, J. concurring).

<sup>7</sup> See *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) for an example of a classic *per se* analysis of a price fixing agreement.

as it applies to tying arrangements, and predicts that its time as the prevailing test for tying arrangements is limited.

## I. TYING ARRANGEMENTS UNDER THE ANTITRUST LAWS

Precluding contractual arrangements that have anticompetitive effects in the marketplace is an important objective of antitrust law.<sup>8</sup> One such contractual arrangement, long recognized by the Supreme Court to have anticompetitive effects on the marketplace, is the tying arrangement.<sup>9</sup> A tying arrangement is an agreement to sell a product (the tying product) only on the condition that the buyer also purchase a different product (the tied product), or at least agree not to purchase that product from any other supplier.<sup>10</sup> Early Supreme Court jurisprudence held that tying arrangements had few, if any, redeeming qualities.<sup>11</sup> Due to this harsh perspective on tying arrangements, the Court began to treat them as illegal *per se*.<sup>12</sup> The requirements for *per*

<sup>8</sup> See Sherman Act § 1, 15 U.S.C. § 1 (2000); Clayton Act § 3, 15 U.S.C. § 14 (2000). Section 1 of the Sherman Act outlaws “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” Sherman Act § 1. Section 3 of the Clayton Act prohibits the sale or contract for sale of goods on the condition that the purchaser refuses to deal with a competitor where the effect of the condition is to lessen competition or create a monopoly in any line of commerce. Clayton Act § 3.

<sup>9</sup> See *Int’l Salt Co. v. United States*, 332 U.S. 392 (1947); *Int’l Bus. Machs. Corp. v. United States*, 298 U.S. 131 (1936); *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922).

<sup>10</sup> *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958); *Carl Sandberg Vill. Condo. Ass’n v. First Condo. Dev. Co.*, 758 F.2d 203, 207 (7th Cir. 1985); *Buyer’s Corner Realty, Inc. v. N. Ky. Ass’n of Realtors*, 410 F. Supp. 2d 574, 578 (E.D. Ky. 2006).

<sup>11</sup> *N. Pac. Ry. Co.*, 356 U.S. at 6 (“[tying arrangements] deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products.”); see also *Standard Oil Co. v. United States*, 337 U.S. 293, 305 (1949) (explaining that tying arrangements are almost always anticompetitive).

<sup>12</sup> *Int’l Salt* 332 U.S. at 396.

*se* illegality of tying arrangements have progressively changed since the Court started analyzing them,<sup>13</sup> and the current test involves more of an economic inquiry than the classic antitrust *per se* analysis.<sup>14</sup> The current *per se* analysis of tying arrangements has been criticized often in recent history,<sup>15</sup> but the Supreme Court has repeatedly refused to overrule it.<sup>16</sup>

### A. The Per Se Tying Analysis is Born

Certain arrangements produce anticompetitive restraints so harmful to competition that the character of the restraint is a sufficient basis for presuming the arrangement is unreasonable under our antitrust laws.<sup>17</sup> These arrangements are condemned as unreasonable *per se* without an intensive analysis of the arrangement's actual market effects.<sup>18</sup>

The *per se* treatment of tying under antitrust law can be traced back to the turn of the twentieth century in cases involving patent misuse.<sup>19</sup> In *Motion Picture Patents Company v. Universal Film Manufacturing Co.* the Supreme Court addressed a licensing agreement allowing use of a patented movie projection machine only for projecting certain films, which were neither part of the patented

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<sup>13</sup> See *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S.Ct. 1281 (2006); *Jefferson Parish Hosp. Dist. No.2 v. Hyde*, 466 U.S. 2 (1984).

<sup>14</sup> See *supra* note 7.

<sup>15</sup> *Ill. Tool Works Inc.*, 126 S.Ct. at 1291; *Jefferson Parish*, 466 U.S. at 35 (O'Connor, J. concurring); 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1730d (2d ed. 2004).

<sup>16</sup> *Ill. Tool Works Inc.*, 126 S.Ct. at 1291; *Jefferson Parish*, 466 U.S. at 10.

<sup>17</sup> *Jefferson Parish*, 466 U.S. at 10.

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917). The plaintiff in this case patented a part on a movie projection machine which feeds film through the machine. *Id.* The machines with the patented parts were sold on the condition that the machines "be used solely for exhibiting or projecting motion pictures" also owned by the plaintiff. *Id.*

machine, nor patented themselves.<sup>20</sup> The Court found this arrangement was illegal because the patentee was extending its legal monopoly on movie projectors to the movie film market.<sup>21</sup> This holding overturned *Henry v. A.B. Dick Co.*,<sup>22</sup> a decision made by the Court just five years prior, that a patentee may impose such conditions on a patent.<sup>23</sup> The Court justified this change by citing the then-recently enacted Clayton Act § 3, which it saw as a possible congressional response to its decision in *A.B. Dick*.<sup>24</sup>

The House Report corresponding to section 3 of the Clayton Act clearly explains the prevailing attitude toward tying arrangements at the time it was drafted.<sup>25</sup> According to the Clayton Act House Report, tying arrangements are “one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man.”<sup>26</sup> The report continues in equally strong and dramatic language: “[the tying arrangement] completely shuts out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice.”<sup>27</sup> This outright condemnation of tying arrangements by Congress

<sup>20</sup> *Id.* at 508.

<sup>21</sup> *Id.* at 517. (explaining that “the owner intends to and does derive its profit, not from the invention on which the law gives it a monopoly, but from the unpatented supplies with which it is used, and which are wholly without the scope of the patent monopoly, thus in effect extending the power to the owner of the patent to fix the price to the public of the unpatented supplies as effectively as he may fix the price on the patented machine”).

<sup>22</sup> 224 U.S. 1 (1912). The agreement at issue in *A.B. Dick* conditioned the sale of a patented duplication machine on the promise to purchase all paper and ink from the duplication machine manufacturer only. *Id.*

<sup>23</sup> *Motion Picture Patents Co.*, 243 U.S. at 518.

<sup>24</sup> *Id.* at 517 (explaining that the Court is “confirmed” in its conclusion to overrule *A.B. Dick* by the Clayton Act § 3, which Congress drafted “as if in response” to the Court’s holding in *A.B. Dick*).

<sup>25</sup> *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11 n.15 (1984) (citing H.R. REP. NO. 63-627, at 12-13 (1914)).

<sup>26</sup> *Jefferson Parish*, 466 U.S. at 11 n.15.

<sup>27</sup> *Id.*

demonstrates the viewpoint that “[t]ying agreements serve hardly any purpose beyond the suppression of competition.”<sup>28</sup> Such a negative outlook on all arrangements to sell two products together, however, is rejected today.<sup>29</sup>

The Supreme Court first explicitly applied the *per se* rule to tying arrangements in *International Salt Co. v. United States*.<sup>30</sup> In this case, International Salt (then, the largest producer of salt for commercial purposes) owned patents on two machines for the “utilization of salt products.”<sup>31</sup> International Salt leased the machines to over 800 separate lessees on the condition that the lessees purchase all salt for use in the machines from International Salt.<sup>32</sup> The Court found that the tying arrangement was unreasonable *per se* because it foreclosed competitors from a market.<sup>33</sup> In its analysis, however, the Court appeared to treat two aspects as threshold determinations, necessary before finding the tying arrangement unreasonable *per se*.<sup>34</sup> The Court first determined that International Salt had market power in the tying market.<sup>35</sup> Then, the Court justified its decision to condemn the arrangement *per se* by explaining that the volume of business it

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<sup>28</sup> *Standard Oil Co. v. United States*, 337 U.S. 293, 305 (1949)

<sup>29</sup> *Jefferson Parish*, 466 U.S. at 11 (explaining that “not every refusal to sell two products separately can be said to restrain competition”).

<sup>30</sup> 332 U.S. 392 (1947)

<sup>31</sup> *Id.* at 394 (The first machine, the Lixator, turned rock salt into a brine useful in industrial products; the second, the Saltomat, injected salt into canned products).

<sup>32</sup> *Id.* at 395 n.5.

<sup>33</sup> *Id.* at 396, 398 (explaining that competitors are able to produce salt of the same quality as International Salt, and are shut out of the market by a provision that “limits [the market], not in terms of quality, but in terms of a particular vendor”).

<sup>34</sup> *Id.* at 395-96.

<sup>35</sup> *Id.* (finding market power in the tying market from International Salt’s patented machines, the Court stated, “[f]rom [the patents] appellant derives a right to restrain others from making, vending or using the patented machines”).

The market power requirement is explained further in *N. Pac. Ry. Co. v. United States*: “where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most.” 356 U.S. 1, 6 (1958).

affected was not insubstantial.<sup>36</sup> These two conditions spurred the Supreme Court's progressive refining of the *per se* tying definition, discussed ahead.

Six years later, the Court addressed a tying arrangement again in *Times-Picayune Publishing Co. v. United States*.<sup>37</sup> This case dealt with the New Orleans newspaper industry, wherein there was one morning and two evening newspapers.<sup>38</sup> The Times-Picayune Publishing Company owned the sole morning newspaper, and one of the two evening newspapers.<sup>39</sup> According to Times-Picayune's contract for sale of advertising space, potential advertisers had to purchase an advertisement in both the morning and the evening newspapers (the tying and tied product, respectively).<sup>40</sup>

The *Times-Picayune* Court allowed the arrangement requiring purchasers of classified advertising space to purchase space in both the morning and evening papers.<sup>41</sup> The Court assessed the market for classified advertising in New Orleans newspapers,<sup>42</sup> and found that the Times-Picayune morning newspaper held a forty percent share of the relevant market for classified advertising.<sup>43</sup> The Court held that this share did not comprise the type of market power required under *International Salt*.<sup>44</sup> Most notably from a historical standpoint, however, the Court also explained that the agreement could not be condemned because it did not involve two separate products.<sup>45</sup> The

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<sup>36</sup> *Int'l Salt*, 332 U.S. 396.

<sup>37</sup> 345 U.S. 594 (1953).

<sup>38</sup> *Id.* at 598-602.

<sup>39</sup> *Id.* at 598.

<sup>40</sup> *Id.* at 599-600.

<sup>41</sup> *Id.* at 596-97.

<sup>42</sup> *Id.* at 612 (surveying the sales of all advertising in New Orleans newspapers and deciding that the Times-Picayune was not dominant in the newspaper advertising market in the city).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 612-13.

<sup>45</sup> *Id.* at 614 (explaining that "[t]he common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the



*Times-Picayune* Court's analysis added this separate-product requirement to the two threshold requirements for *per se* treatment of tying arrangements promulgated in *International Salt*.

While the *Times-Picayune* Court recognized the *International Salt* threshold requirements for *per se* treatment of tying arrangements, its opinion deviated somewhat from the *International Salt* analysis.<sup>46</sup> The Supreme Court clearly restated its conception of the *per se* rule against tying arrangements in *Northern Pacific Railway Co. v. United States* ("NPRC").<sup>47</sup> In 1864 and 1870 the United States government granted the defendant approximately forty million acres of land across the continent on which to build a railroad.<sup>48</sup> The land was granted in belts that ranged from twenty to forty miles wide.<sup>49</sup> The railroad sold some of the land and maintained and leased out the rest of the land.<sup>50</sup> The sales contracts and lease agreements included a clause requiring the owners or lessees to use the defendant's railroad lines for shipping all commodities made on the land.<sup>51</sup> The United States brought suit claiming these contracts constituted illegal tying arrangements.<sup>52</sup>

The NPRC Court addressed this tying arrangement, whereby the defendant railroad company sold parcels of land it owned (the tying good) on the condition that the owners of that land use the railroad company for all their shipping needs (the tied service).<sup>53</sup> The Supreme

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desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market").

<sup>46</sup> The Court deviated from the *International Salt* holding in that it (1) required actual proof of market power in the tying product market, and (2) used slightly different analyses for tying under section 1 of the Sherman Act and section 3 of the Clayton Act. *Id.* at 608-09, 610-13.

<sup>47</sup> 356 U.S. 1 (1958).

<sup>48</sup> *Id.* at 2.

<sup>49</sup> *Id.* at 3.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 3-4.

<sup>53</sup> *Id.* Also note that the Court addressed this arrangement under section 1 of the Sherman Act, and not the Clayton Act because the Clayton Act applies only to commodities and land is not a commodity. *Id.* at 14 n.1.

Court emphasized that tying arrangements are “unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a ‘not insubstantial’ amount of interstate commerce is affected.”<sup>54</sup> In holding the arrangement unreasonable *per se*, the Court inferred market power in the tying product (land for sale) because the railroad company was given large tracts of land by the government.<sup>55</sup> Additionally, the Court inferred a “not insubstantial” effect on commerce by the nature of the agreement.<sup>56</sup>

Despite the emphatic argument in the dissent, the *NPRC* majority implied that tying is treated the same under section 1 of the Sherman Act, and section 3 of the Clayton Act, and that *proof* of market power in the tying market is unnecessary.<sup>57</sup> Additionally, the *NPRC* Court referred to the defendant’s use of market power to induce large numbers of customers to give it preference over its competitors as “leverage.”<sup>58</sup> The leverage concept continues to be important in tying arrangement analysis today.<sup>59</sup> *NPRC* showcases the strict *per se*

<sup>54</sup> *Id.* at 6 (citing *Int’l Salt Co. v. United States*, 332 U.S. 392 (1947)).

<sup>55</sup> *N. Pac. Ry.*, 356 U.S. at 7.

<sup>56</sup> *Id.* at 12 (stating that no matter what possible redeeming qualities the tying agreements may have, the “essential fact remains that these agreements are binding obligations held over the heads of vendees which deny defendant’s competitors access to the fenced-off market on the same terms as the defendant”).

<sup>57</sup> *See id.* at 13-14 (Harlan, J. dissenting) (arguing that tying agreements assessed under Sherman Act § 1 “raise legal issues different from those presented by the legislatively defined tying clauses invalidated under the more pointed prohibitions of the Clayton Act,” and that “both *proof* of dominance in the market for the tying product *and* a showing that an appreciable volume of business in the tied product is restrained are essential conditions to judicial condemnation of a tying clause as a *per se* violation of the Sherman Act”) (emphasis in original).

<sup>58</sup> *Id.*, 356 U.S. at 7

<sup>59</sup> *See* 9 AREEDA & HOVENKAMP, *supra* note 15, ¶ 1700d (stating that “[t]he original, continuing, and most fundamental concern about tying is ‘leverage’”); 5 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* ¶ 1134a (1981) (defining leverage as “a supplier’s power to induce his customer for one product to buy a

treatment of tying arrangements in the Court's early cases.<sup>60</sup> The Court's approach to tying arrangements began to change through the 1960's and 1970's.<sup>61</sup>

### *B. Changing Per Se Illegality*

The Supreme Court's change from its rigid analysis of tying arrangements to a more cautious approach, requiring more proof of market power and anticompetitive effects, is exemplified through its decisions in *Fortner Enterprises Inc. v. United States Steel Corp.*<sup>62</sup> ("*Fortner I*") and *United States Steel Corp v. Fortner Enterprises Inc.*<sup>63</sup> ("*Fortner II*"). The plaintiff in *Fortner I* filed a tying arrangement suit against defendants, U.S. Steel and U.S. Steel Homes Credit Corp., its wholly-owned subsidiary credit corporation (the "Credit Corporation").<sup>64</sup> The alleged tying arrangement in *Fortner I*<sup>65</sup> required corporations and individuals to purchase prefabricated steel homes from U.S. Steel (the tied product) as a condition to obtaining financing from the Credit Corporation (the tying service).<sup>66</sup> The plaintiff explained that he agreed to purchase the prefabricated steel homes so he could obtain financing for 100 percent of his land from the Credit Corporation; no other company would provide him that service.<sup>67</sup> *Fortner I* was granted certiorari after the Sixth Circuit affirmed the district court's decision in favor of the defendants in a

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second product from him that would not otherwise be purchased solely on the merit of that second product").

<sup>60</sup> For another example of a strict *per se* analysis, see *Fortner Enters. Inc. v. U.S. Steel Corp.* ("*Fortner I*"), 394 U.S. 495 (1969).

<sup>61</sup> This change has been credited to the Chicago-School's influence on antitrust law during that period. See Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469 (2001).

<sup>62</sup> 394 U.S. 495 (1969).

<sup>63</sup> 429 U.S. 610 (1977).

<sup>64</sup> *Fortner I*, 394 U.S. at 496-97.

<sup>65</sup> And in *Fortner II*.

<sup>66</sup> *Fortner I*, 394 U.S. at 497.

<sup>67</sup> *Id.* at 504.

summary judgment proceeding on the grounds that the plaintiff failed to establish sufficient market power in the tying service.<sup>68</sup>

The Supreme Court first rejected the district court's finding that the plaintiff could not proceed on the merits of the case where it failed to prove market power in the tying service.<sup>69</sup> The Court then turned to whether the plaintiff pled facts which, if proved at trial, could render the defendants' tying arrangement illegal *per se*.<sup>70</sup> In finding that the plaintiff pled sufficient facts showing economic power in the tying service, the Court emphasized that the Credit Corporation's terms were "uniquely and unusually advantageous."<sup>71</sup> From this, the Court inferred that the Credit Corporation had "unique economic advantages" over its competitors.<sup>72</sup> In other words, the Court held that sufficient market power in the tying market could be shown because the rate offered by the credit company was unique.<sup>73</sup> Therefore, the Supreme Court found that the plaintiff sufficiently stated a cause of action and allowed the case to proceed.<sup>74</sup> The *Fortner I* decision came

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<sup>68</sup> *Fortner Enters. v. U. S. Steel Corp.*, 293 F. Supp. 762, 768 (W.D. Ky. 1966), *aff'd* 404 F.2d 936 (6th Cir. 1968), *rev'd* 394 U.S. 495 (1969).

<sup>69</sup> *Fortner I*, 394 U.S. at 500 (explaining that a finding that the plaintiff failed to meet the standards of *Int'l Salt* and *NPRC* cannot be fatal for the plaintiff's antitrust case, and that "[a] plaintiff can still prevail on the merits whenever he can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated"). Here, the Court meant that even if the agreement is not *per se* illegal as a tying arrangement, it may be illegal under the rule of reason, which is explained *infra* note 104.

<sup>70</sup> *Fortner I*, 394 U.S. at 500-01.

<sup>71</sup> *Id.* at 504-505 (the Court was referring specifically to the Credit Corporation's ability to provide financing for 100 percent of the purchase price of a plot of land).

<sup>72</sup> *Id.*

<sup>73</sup> However, the Court added in a footnote that "[u]niqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves." *Id.* at 506 n.2. This footnote became important in *Fortner II*.

<sup>74</sup> *Fortner I*, 394 U.S. at 510.

with four dissenting Justices, foreshadowing the different outcome in *Fortner II*.<sup>75</sup>

Eight years after the Court decided *Fortner I*, the same case came knocking at its door; this time, the issue was whether the credit company actually had sufficient economic power in the tying market.<sup>76</sup> Unlike in *Fortner I*, the Court in *Fortner II* was not hasty to infer market power in the tying market from the uniqueness of the tying producer's product.<sup>77</sup> While the Court asserted that its decision in *Fortner II* was consistent with *Fortner I*, it held that the plaintiff failed to establish market power in the tying service.<sup>78</sup> In *Fortner II*, the Court refused to infer that the Credit Corporation held sufficient market power in the credit industry because of U.S. Steel's size, and likewise refused to infer market power from the fact that a large number of purchasers accepted the tied package.<sup>79</sup> The Court also rejected the inference of market power from the noncompetitive price charged for the tied product (building materials for houses).<sup>80</sup>

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<sup>75</sup> United States Steel Corp. v. Fortner Enters. Inc., (*"Fortner II"*), 429 U.S. 610 (1977).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 622; see also James P. Melican, Jr., *Antitrust Developments: Tying Arrangements and Related Restrictions after Fortner II*, 51 ANTITRUST L.J. 157, n.13 (1982) (stating that "[a]lthough Justice Stevens went to great pains to stress that there was nothing inconsistent between the Supreme Court's opinions in *Fortner I* and *II*, many commentators and more than a few judges seem to have concluded that the signals did in fact change).

<sup>78</sup> *Fortner II*, 429 U.S. at 615 (the plaintiff asserted that market power was present from four factors: "(1) petitioner Credit Corp. and the Home Division were owned by one of the Nation's largest corporations; (2) petitioners entered into tying arrangements with a significant number of customers in addition to Fortner; (3) the Home Division charged respondent a noncompetitive price for its prefabricated homes; and (4) the financing provided to Fortner was 'unique,' primarily because it covered one hundred percent of Fortner's acquisition and development costs").

<sup>79</sup> *Id.* at 617-19 n.10.

<sup>80</sup> *Id.* at 618.

Perhaps most surprising,<sup>81</sup> considering the direction in which the Court seemed to be going with respect to inferring market power in *Fortner I*, was its refusal to infer market power from the uniqueness of the Credit Corporation's service.<sup>82</sup> The Court decided that in the absence of proof that the Credit Corporation had a cost advantage in the tying market, the credit company could not have "the kind of uniqueness considered relevant" in tying arrangement analysis.<sup>83</sup> In its *Fortner II* opinion, the Court emphasized footnote 2 of *Fortner I*, which required the tying product to have a competitive advantage in the tying market in order to infer market power from uniqueness.<sup>84</sup> The Court in *Fortner II* used this competitive advantage requirement to justify its holding that the credit company's service did not have the type of uniqueness that requires an inference of market power.<sup>85</sup> These requirements highlighted in *Fortner II* seemed similar to the analysis in *Times-Picayune* that started to stray from the *International Salt* strict *per se* analysis; however, the Court still referred to its analysis as a *per se* inquiry.<sup>86</sup>

### C. The Per Se Analysis under the Supreme Court Today

While the changing views of the *per se* rule for tying arrangements explained above may make the rule seem somewhat unstable, one maxim has emerged from the previously examined cases

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<sup>81</sup> Melican, *supra* note 77, at n.16 (remarking, "[t]he Supreme Court's conclusion in *Fortner II* that Fortner had simply failed to sustain the burden of proof of sufficient economic power the Court had outlined in *Fortner I* must have come as a surprise to more than a few of the lawyers and judges involved in the long history of that case").

<sup>82</sup> *Fortner II*, 429 U.S. at 620-21.

<sup>83</sup> *Id.*

<sup>84</sup> See note 73 *supra*.

<sup>85</sup> *Fortner II*, 429 U.S. at 621-22 (holding that "if the evidence merely shows that credit terms are unique because the seller is willing to accept a lesser profit -- or to incur greater risks -- than its competitors, that kind of uniqueness will not give rise to any inference of economic power in the credit market").

<sup>86</sup> *Id.* at 612.

and has remained at the forefront of the tying analysis: “the essential characteristic of an invalid tying arrangement lies in the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.”<sup>87</sup> This concept reflects the decisions and emphasized policies contained in many of the previously addressed cases.

The Supreme Court majority in *Jefferson Parish* clung strongly to the *per se* rule for contractual tying arrangements in a hotly-contested opinion that has since endured.<sup>88</sup> The five-to-four decision in *Jefferson Parish* saw all nine Justices agree in upholding the arrangement at issue, but disagree on the appropriate road to that conclusion.<sup>89</sup> Despite the arguments against the application of the *per se* rule contained in Justice O’Connor’s concurrence, Justice Stevens’ majority opinion proclaimed, “[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable ‘per se.’”<sup>90</sup>

The tying arrangement in *Jefferson Parish* consisted of a contract between a hospital (the “Hospital”) and a firm of anesthesiologists (the “Firm”) establishing the Firm as the sole provider of anesthesia in the Hospital.<sup>91</sup> The plaintiff asserted that this agreement constituted a *per se* violation of section 1 of the Sherman Act as a tying arrangement because patients at the Hospital must use an anesthesiologist from the Firm.<sup>92</sup>

Justice Stevens began his majority opinion by explaining the importance of “forcing” (derived from the concept of leverage) in the

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<sup>87</sup> See *Ill. Tool Works Inc. v. Indep. Ink Inc.*, 126 S.Ct. 1281, 1286 (2006) (citing *Jefferson Parish Hosp. Dist. No.2 v. Hyde*, 466 U.S. 2, 12 (1984)).

<sup>88</sup> See *Jefferson Parish*, 466 U.S. 2.

<sup>89</sup> See *id.*

<sup>90</sup> *Id.* at 10.

<sup>91</sup> *Id.* at 4. The tying service in this agreement was hospital care; the tied service was “anesthesiological services.” *Id.* at 2.

<sup>92</sup> *Id.*

*per se* tying arrangement analysis.<sup>93</sup> He then delved into the appropriate threshold requirements a court must address before finding a tying arrangement is unreasonable *per se*.<sup>94</sup> The majority recognized that a prerequisite for condemning tying arrangements under the *per se* rule is the existence of “some special ability [held by the seller]—usually called ‘market power’—to force a purchaser to do something that he would not do in a competitive market.”<sup>95</sup> A second threshold requirement recognized by the *Jefferson Parish* majority as necessary for *per se* condemnation of a tying arrangement is the foreclosure of “a substantial volume of commerce” by the arrangement.<sup>96</sup> The majority concluded its explanation of the *per se* rule’s threshold requirements by asserting that a tying arrangement requires the sale of two *separate* products or services.<sup>97</sup> This statement of the requirements for *per se*

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<sup>93</sup> *Id.* at 12 (explaining that “forcing” exists where the seller can exploit “its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms,” and that when “‘forcing’ is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated”).

<sup>94</sup> *Id.* at 12-19.

<sup>95</sup> *Id.* at 13-17 (explaining in dicta that market power in the tying product, which makes forcing likely, exists where (1) the seller has a patent or similar monopoly, (2) the seller’s share of the market is high, or (3) the seller is able to offer a unique product that competitors are unable to offer).

<sup>96</sup> *Id.* at 16 (stating, “when a purchaser is ‘forced’ to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed”); *but see id.* at 12 (explaining that an invalid tying arrangement exists where the buyer was forced “into the purchase of a tied product that the buyer *either did not want at all*, or might have preferred to purchase elsewhere on different terms”) (emphasis added).

<sup>97</sup> *Id.* at 18 (holding, “we must consider whether petitioners are selling two separate products that may be tied together, and, if so, whether [the defendants] have used their market power to force their patients to accept the tying arrangement”).



illegality of tying arrangements continues to constitute the test favored by the Supreme Court when addressing tying arrangements.<sup>98</sup>

After analyzing the services offered by the Hospital and the Firm, the majority concluded that “anesthesiological services and the other hospital services” are separate products, and are treated so by patients.<sup>99</sup> The Court then moved on to the market power requirement and found the Hospital lacked sufficient market power to force the tie on consumers.<sup>100</sup> The majority upheld the tying arrangement because the plaintiff’s only evidence of market power was a “preference” for services from the Hospital.<sup>101</sup> The Court stated that such a preference is not probative of significant market power especially where seventy percent of the Jefferson Parish (where the Hospital is located) residents enter other hospitals.<sup>102</sup>

Justice O’Connor authored the concurrence in *Jefferson Parish* (joined by Chief Justice Burger and Justices Powell and Rehnquist) calling for the abandonment of the *per se* standard for tying arrangements.<sup>103</sup> The concurrence asserted that the only proper way to assess the validity of tying arrangements is through a rule of reason analysis.<sup>104</sup> The approach to analyzing tying arrangements proposed by Justice O’Connor includes three requirements that the agreement

<sup>98</sup> See, e.g., *Ill. Tool Works Inc. v. Indep. Ink Inc.*, 126 S.Ct. 1281, 1286, 1291 (2006); *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451 (1992).

<sup>99</sup> *Jefferson Parish*, 466 U.S. at 19-20.

<sup>100</sup> *Id.* at 26

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 26-27 (stating that “[t]he fact that a substantial majority of the parish’s residents elect not to enter East Jefferson means that the geographic data do not establish the kind of dominant market position that obviates the need for further inquiry into actual competitive conditions”).

<sup>103</sup> *Id.* at 35 (arguing that “[t]he time has . . . come to abandon the ‘*per se*’ label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have”).

<sup>104</sup> A rule of reason analysis (the alternative to a *per se* analysis in antitrust) focuses on whether a contract actually unreasonably restrains competition. This uses an inquiry into the actual economic benefits and detriments the particular agreement causes in the market, and analyzes each individual agreement separately. *Id.* at 30, 41 (O’Connor, J. concurring).

must meet in order to warrant further inquiry of the arrangement;<sup>105</sup> Justice O'Connor insists however, that a tying arrangement meeting all three requirements should still be upheld if it creates sufficient economic benefits.<sup>106</sup>

The arguments contained in the *Jefferson Parish* concurrence have been well-received by some scholars, and even judges.<sup>107</sup> However, the *per se* analysis explained by the majority remains the analysis used today in assessing contractual tying arrangements.<sup>108</sup>

A recent Supreme Court decision upheld the *Jefferson Parish* majority's *per se* analysis of tying arrangements while also citing favorably Justice O'Connor's arguments in the concurrence.<sup>109</sup> *Illinois Tool Works* presented a tying arrangement whereby the defendant sold its patented printheads (the tying product) to printer manufacturers on the condition that the printer manufacturers agree to purchase ink (the tied product) for the printheads exclusively from the defendant.<sup>110</sup> The Court focused its analysis of the agreement on whether the record supported the appellate court's finding that the defendant's patent on

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<sup>105</sup> *Id.* at 41 (O'Connor's requirements for a rule of reason inquiry are: (1) market power in the tying product, (2) a substantial threat of market power in the tied product, and (3) a coherent economic basis for treating the products as distinct).

<sup>106</sup> *Id.*

<sup>107</sup> *Ill. Tool Works Inc. v. Indep. Ink Inc.*, 126 S.Ct. 1281, 1288 (2006) (agreeing with Justice O'Connor's argument that "the presumption that a patent always gives the patentee significant market power" is improper in assessing market power in the tying product); *Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203, 210 (7th Cir. 1985); *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 676 (6th Cir. 1986); Hylton *supra* note 61, at 479 (contending that Justice O'Connor's rule of reason analysis "would have brought contractual tying doctrine in line with the technological integration case law developed in lower courts"); 10 PHILLIP E. AREEDA, HERBERT HOVENKAMP & EINER ELHAUGE ANTITRUST LAW ¶ 1737c (2d ed. 2004).

<sup>108</sup> *Ill. Tool Works*, 126 S.Ct. at 1291 (favoring the *Jefferson Parish* majority's standards for addressing tying arrangements).

<sup>109</sup> *See Ill. Tool Works*, 126 S.Ct. 1281.

<sup>110</sup> *Id.* at 1284.

the tying product inferred market power in the tying product's market.<sup>111</sup>

In reversing the Federal Circuit's decision, the Court held that a patent on a tying product does not infer market power in the tying product's market.<sup>112</sup> This holding ran counter to the dictum in *Jefferson Parish* regarding a patent's effect on market power.<sup>113</sup> The Court explained its decision that a patent no longer infers market power: "after our decision in *Jefferson Parish* repeated the patent-equals-market-power presumption [citation omitted], Congress amended the Patent Code to eliminate that presumption in the patent misuse context."<sup>114</sup> Because the basis for inferring market power from patents was revoked,<sup>115</sup> the Court determined "it would be anomalous to preserve the presumption" of market power from the existence of a patent.<sup>116</sup> This result is consistent with Justice O'Connor's argument in her *Jefferson Parish* concurrence that the existence of a patent alone is insufficient to demonstrate that a seller possesses sufficient market power.<sup>117</sup>

While the *Illinois Tool Works* Court dismissed the inference of market power from a patent explained in the *Jefferson Parish* decision, it also explicitly recognized that the general *per se* test explicated in *Jefferson Parish* is the proper analysis for tying arrangements.<sup>118</sup> The Court now seems to require the same proof of market power necessary to engage in forcing<sup>119</sup> in cases involving intellectual property holders as it does in cases not involving intellectual property holders (such as

<sup>111</sup> *Indep. Ink, Inc. v. Ill. Tool Works, Inc.* 396 F.3d 1342, 1344 (Fed. Cir. 2005).

<sup>112</sup> *Ill. Tool Works*, 126 S.Ct. at 1291.

<sup>113</sup> *See supra* note 95.

<sup>114</sup> *Ill. Tool Works*, 126 S.Ct. at 1290.

<sup>115</sup> *See supra* discussion on the history of tying arrangements in Section I(A).

<sup>116</sup> *Ill. Tool Works*, 126 S.Ct. at 1290.

<sup>117</sup> *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 38 n.7 (1984)

<sup>118</sup> *Ill. Tool Works*, 126 S.Ct. at 1291 (holding that "tying arrangements involving patented products should be evaluated under the standards applied in cases like *Fortner II* and *Jefferson Parish*").

<sup>119</sup> *See supra* note 93.

*Jefferson Parish*).<sup>120</sup> In the short period of time since the Court’s analysis in *Illinois Tool Works*, its holding has already caused some confusion in the lower courts with respect to the application of the *Jefferson Parish per se* tying analysis.<sup>121</sup>

#### *D. The Seventh Circuit and the “Economic Interest” Requirement*

Some circuits have required the plaintiff to show an additional element before the court will find a tying arrangement is unlawful *per se*. This element, the “economic interest” requirement, first surfaced in the Fourth Circuit in 1958.<sup>122</sup> Although the requirement’s direct applicability to the *per se* tying test was uncertain,<sup>123</sup> other circuits began to employ the economic interest requirement in their *per se* tying arrangement analyses.<sup>124</sup>

The Seventh Circuit announced its approval of the economic interest requirement in *Ohio-Sealy Mattress Manufacturing Co. v. Sealy*.<sup>125</sup> This 1978 holding cited a Sixth Circuit case in stating “there is no illegal tying arrangement where a ‘tying’ company has absolutely no financial interest in the sales” of the tied company.<sup>126</sup>

<sup>120</sup> *Ill. Tool Works*, 126 S.Ct. at 1291 (stating, “[w]hile some [tying arrangements involving patented products] are still unlawful, such as those that are the product of a true monopoly or a marketwide conspiracy [citations omitted], that conclusion must be supported by proof of power in the relevant market rather than by a mere presumption” of market power from the existence of a patent).

<sup>121</sup> See *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312 (7th Cir. 2006).

<sup>122</sup> *Miller Motors v. Ford Motor Co.*, 252 F.2d 441 (4th Cir. 1958).

<sup>123</sup> See Eric D. Young, *The Economic Interest Requirement in the Per Se Analysis of Tying Arrangements: A Worthless Inquiry*, 58 FORDHAM L. REV. 1353, 1364-65 (1990) (explaining that “*Miller* addressed two separate claims” and that “the first part of the opinion [in *Miller*], which identified an economic interest requirement, did not even address tying arrangements”).

<sup>124</sup> See *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1478-81 (9th Cir. 1983); *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 456 (5th Cir. 1979); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 835 (7th Cir. 1978); *Crawford Transp. Co. v. Chrysler Corp.*, 338 F.2d 934, 939 (6th Cir. 1964).

<sup>125</sup> *Ohio-Sealy Mattress*, 585 F.2d 821 at 835.

<sup>126</sup> *Id.*

The Seventh Circuit's decision in *Carl Sandburg Village Condominium Association No. 1 v. First Condominium Development Co.*,<sup>127</sup> written by Judge Flaum exactly one year after *Jefferson Parish*,<sup>128</sup> reaffirmed the Seventh Circuit's reliance on the economic interest requirement in its tying arrangement analysis. Unlike the *Reifert* case, the holding of *Carl Sandburg Village* hinged on the application of the economic interest requirement.<sup>129</sup> The alleged tying arrangement in *Carl Sandburg Village* involved the sale of condominium units (the tying product) conditioned on the signing of maintenance and management contracts (the tied service) with a particular service provider.<sup>130</sup> The condominium developer and the provider of management and maintenance services were unaffiliated entities.<sup>131</sup> The *Carl Sandburg Village* court upheld the arrangement at issue because the plaintiff failed to "establish the necessary economic interest element of the tying seller in the tied product market."<sup>132</sup>

The court justified its implementation of the economic interest requirement by noting that it is used "by courts in the Second, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits,"<sup>133</sup> and by reciting policy concerns raised in Justice O'Connor's *Jefferson Parish*

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<sup>127</sup> 758 F.2d 203 (7th Cir. 1985).

<sup>128</sup> The Seventh Circuit's decision in *Carl Sandburg Vill.*, however, affirmed a district court's holding from a year prior to the Supreme Court's *Jefferson Parish* decision. *See Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.* 586 F. Supp. 155 (N.D. Ill. 1983).

<sup>129</sup> *Carl Sandburg Vill.*, 758 F.2d at 209.

<sup>130</sup> *Id.* at 205

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 209.

<sup>133</sup> *Id.* at 208. Since the *Carl Sandburg Village* decision, the Second Circuit has expressly rejected the economic interest requirement in *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514 (2d Cir. 1989); the Third Circuit has omitted the requirement from its stated *per se* tying inquiry in *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494 (3d Cir. 1998); the Eleventh Circuit has continued use of the requirement, but expressed doubt in its applicability to tying arrangements in *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1579 n.12 (11th Cir. 1991); and, the Tenth Circuit has adopted the requirement in *Abraham v. Intermountain Health Care, Inc.*, 461 F.3d 1249 (10th Cir. 2006).

concurrence.<sup>134</sup> The Seventh Circuit cited the *Jefferson Parish* concurrence in stating that the goal of antitrust laws “in the tying context is to prevent the economically harmful effects of tie-ins in cases where a seller’s power in the market for the tying product is used to create additional power in the market for the tied product.”<sup>135</sup> This policy consideration led the *Carl Sandburg Village* court to announce that “[o]ne of the threshold criteria that a plaintiff must satisfy under . . . the *per se* . . . analys[is] . . . is that there is a substantial danger that the tying seller will acquire market power in the tied product market.”<sup>136</sup>

Two and a half years later, the Seventh Circuit rethought its position on the economic interest requirement in *Parts and Electric Motors, Inc. v. Sterling Electric, Inc.* (“*P&E*”).<sup>137</sup> The issue in *P&E* was an arrangement whereby the defendant sold replacement parts for electric motors (the tying product) to distributors on the condition that the distributors also agree to purchase and “aggressively promote minimum quantities” of electric motors (the tied product).<sup>138</sup>

The defendant in *P&E* failed to preserve the issue of whether the economic interest requirement is necessary in a *per se* tying analysis on appeal to the Seventh Circuit;<sup>139</sup> nevertheless, the court addressed

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<sup>134</sup> *Carl Sandburg Vill.*, 758 F.2d at 210 (stating that, in order to establish *per se* illegality of a tying arrangement, a plaintiff must show that “there is a substantial danger that the tying seller will acquire market power in the tied product market” (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 36-39 (1984) (O’Connor, J. concurring)).

<sup>135</sup> *Carl Sandburg Vill.*, 758 F.2d at 210 (citing *Jefferson Parish*, 466 U.S. 2, 36-37 (O’Connor, J. concurring)); *but see Jefferson Parish*, 466 U.S. at 13 n.19 (explaining that “[t]he tying seller may be working toward a monopoly position in the tied product, and even if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market”) (quoting *Fortner Enter. v. United States Steel Corp.* 394 U.S. 495, 512-14 (1969) (White, J. dissenting)).

<sup>136</sup> *Carl Sandburg Vill.*, 758 F.2d at 210.

<sup>137</sup> 826 F.2d 712 (7th Cir. 1987).

<sup>138</sup> *Id.* at 713-14.

<sup>139</sup> *Id.* at 714. The defendant did not object to the jury instruction that “market power [in the tied product] is not relevant” during trial, nor did it proffer an

the issue in dicta.<sup>140</sup> The *P&E* court explained that *Carl Sandburg Village* is controlled by *Jefferson Parish*.<sup>141</sup> After analyzing the policy considerations and the holding in *Jefferson Parish*, the Seventh Circuit in *P&E* expressed a view that the *Jefferson Parish* majority does not “articulate as a prerequisite to a tying violation that there be a substantial danger that the tying seller will acquire market power in the tied product market.”<sup>142</sup>

The *P&E* court recognized that Justice O’Connor’s *Jefferson Parish* concurrence created a debate “among both judges and scholars” on this topic.<sup>143</sup> The Seventh Circuit concludes, however, by noting “notwithstanding this debate, the requirement that there be a threat of market power in the tied product has not been endorsed as a requisite for a tying violation by a Supreme Court majority.”<sup>144</sup>

## II. THE SEVENTH CIRCUIT’S APPROACH TO TYING ARRANGEMENTS IN *REIFERT V. SOUTH CENTRAL WISCONSIN MLS CORP.*

In *Reifert v. South Central Wisconsin MLS Corp.*,<sup>145</sup> the Seventh Circuit put its stamp on a factual issue already confronted by several other circuits.<sup>146</sup> The plaintiff in *Reifert* was a real estate buyer’s agent who alleged that the defendant (a real estate multiple listing service

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instruction that market power in the tied product was important to the claim that the tying arrangement was *per se* illegal. *Id.* at 717.

<sup>140</sup> *Id.* at 718.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 718-19 (stating, “[o]n the other hand, Justice O’Connor, in a concurring opinion joined by three other Justices, advocates in [*Jefferson Parish*] that *per se* principles of liability be abandoned and that to establish a tying violation ‘there must be a substantial threat that the tying seller will acquire market power in the tied-product market’”) (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 38 (O’Connor, J. concurring)).

<sup>144</sup> *Parts & Elec. Motors*, 826 F.2d at 719.

<sup>145</sup> 450 F.3d 312 (7th Cir. 2006).

<sup>146</sup> See *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991); *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir. 1988).

("MLS"))<sup>147</sup> engaged in an illegal tying arrangement by conditioning access to its services (the tying service) on the purchase of a membership in a local Realtors Association (the tied service).<sup>148</sup> This same arrangement was addressed by the First and Eleventh Circuits prior to *Reifert*. A brief look at these circuits' holdings on this issue will assist the analysis of the Seventh Circuit's *Reifert* opinion.

The MLS tying arrangement issue arose in *Wells Real Estate v. Greater Lowell Board of Realtors* in 1988.<sup>149</sup> The plaintiff in *Wells* appealed to the First Circuit the district court's directed verdict for the defendants on his tying claim.<sup>150</sup> The court in *Wells* upheld the arrangement because the plaintiff failed to show that it foreclosed a substantial volume of commerce.<sup>151</sup> The First Circuit so held because the plaintiff did not demonstrate a market for real estate board membership affected by the arrangement.<sup>152</sup> Conversely, the Eleventh Circuit found that the plaintiff sufficiently pled that an MLS tying arrangement was illegal *per se* in *Thompson v. Metropolitan Multi-List, Inc.*<sup>153</sup> The *Thompson* court found that the arrangement had a "not insubstantial" effect on interstate commerce because the plaintiff showed that another real estate membership board lost around 400 members due to the agreement.<sup>154</sup>

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<sup>147</sup> An MLS includes a computerized database of homes and properties for sale in a particular market. *Reifert v. S. Cent. Wis. MLS Corp.*, No. 04-C-969-S, 2005 U.S. Dist. LEXIS 23431, \*3 (W.D. Wisc. Aug. 25, 2005).

<sup>148</sup> *Reifert*, 450 F.3d at 315.

<sup>149</sup> *Wells*, 850 F.2d at 803.

<sup>150</sup> *Id.* at 807.

<sup>151</sup> *Id.* at 815.

<sup>152</sup> *Id.* (explaining that there is no evidence that other brokers would have purchased membership in other real estate boards "but for the power exerted by the lure of the defendants' MLS").

<sup>153</sup> 934 F.2d 1566, 1579 (11th Cir. 1991).

<sup>154</sup> *Id.* at 1577-78 (the plaintiff submitted an affidavit from an officer of a competing real estate board stating that because of the cost of joining both boards, 400 members or potential members of the affiant's board have quit or declined to join).



While the *Wells* and *Thompson* cases reached different outcomes in assessing the sufficiency of real estate MLS tying claims, their reasoning is consistent. Both cases can be read together to conclude that a real estate MLS tying claim is insufficient where there is no evidence of a real estate association that competes with the association favored by the tie to MLS access.<sup>155</sup> Therefore, *Wells* and *Thompson* both properly require foreclosure of a substantial amount of commerce in the tied product market (i.e. the market for real estate association memberships) in assessing the legality of a real estate MLS tying arrangement.

#### A. Reifert's Tying Claim

The plaintiff in *Reifert* ("Mr. Reifert") was a licensed real estate broker located in south central Wisconsin.<sup>156</sup> His membership in the Realtors Association of South Central Wisconsin ("RASCW") and his use of South Central Wisconsin MLS's ("SCWMLS") services began in 1988.<sup>157</sup> He claimed that he had no desire to maintain his RASCW membership, and that he belonged to RASCW only because it enabled him to access SCWMLS.<sup>158</sup> The plaintiff objected to the fees he was forced to pay as a result of his membership in RASCW, and claimed that he was forced to pay dues in excess of \$2,000.00 for this unwanted membership during a four-year period.<sup>159</sup>

Mr. Reifert's ill-fated tying arrangement claim began in the United States District Court for the Western District of Wisconsin.<sup>160</sup> Judge John C. Shabaz ruled on cross motions for summary judgment

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<sup>155</sup> ROBERT D. BUTTERS, 10A-8 REAL ESTATE BROKERAGE LAW AND PRACTICE § 8.04 (MATTHEW BENDER & CO., INC. 2006).

<sup>156</sup> *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 315 (7th Cir. 2006).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Reifert v. S. Cent. Wis. MLS Corp.*, No. 04-C-969-S, 2005 U.S. Dist. LEXIS 23431 (W.D. Wisc. Aug. 25, 2005).

in favor of the defendant, SCWMLS.<sup>161</sup> The district judge relied heavily on the First Circuit's *Wells*<sup>162</sup> decision in his analysis of the facts in *Reifert*.<sup>163</sup> Consequently, summary judgment was granted for the defendant because the plaintiff failed to show that "there are competing providers of services in the tied product market whose sales have been foreclosed by the tie between [the] MLS and [RASCW]."<sup>164</sup> In differentiating this case from *Thompson*, Judge Shabaz noted that the plaintiff did not offer "evidence of a single real estate professional who has joined [another real estate association] instead of [RASCW] or who has declined to join [a different real estate association] because he or she is a member of [RASCW]."<sup>165</sup> The plaintiff appealed this decision to the Seventh Circuit Court of Appeals.

### *B. The Seventh Circuit Majority's Analysis of Reifert*

Judge Flaum (along with Judge Kanne) agreed with the district court in his opinion on appeal.<sup>166</sup> The *Reifert* majority first announced the test it employs for tying arrangements; it explained "*this* Court requires the plaintiff to prove four elements."<sup>167</sup> The court then set forth the elements:

In order to establish the per se illegality of a tying arrangement, a plaintiff must show that: (1) the tying arrangement is between two distinct products or services, (2) the defendant has sufficient economic power in the tying market to appreciably restrain free competition in the market for the tied product, and (3) a

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<sup>161</sup> *Id.* at \*16.

<sup>162</sup> *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 815 (1st Cir. 1988).

<sup>163</sup> *Reifert*, 2005 U.S. Dist. LEXIS 23431 at \*9.

<sup>164</sup> *Id.* at \*16.

<sup>165</sup> *Id.* at \*13.

<sup>166</sup> *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 321 (7th Cir. 2006).

<sup>167</sup> *Id.* at 316 (emphasis added).

not insubstantial amount of interstate commerce is affected [citations omitted]. In addition, this circuit has held that an illegal tying arrangement will not be found where the alleged tying company has absolutely no economic interest in the sales of the tied seller, whose products are favored by the tie-in.<sup>168</sup>

Judge Flaum recognized that the plaintiff easily satisfies the first two elements of this test.<sup>169</sup> The Seventh Circuit, however, agreed with the district court that the plaintiff could not show foreclosure of commerce without evidence of competitors in the market for services offered by RASCW.<sup>170</sup>

Part of the majority's opinion in *Reifert* attempts to justify the *per se* tying analysis declared therein.<sup>171</sup> This is in direct response to the concurrence's disapproval of including the economic interest factor in the *per se* tying test.<sup>172</sup> In note 2 of his majority opinion, Judge Flaum defends the use of the economic interest factor by stating that (1) the Supreme Court recently approved of Justice O'Connor's *Jefferson Parish* concurrence,<sup>173</sup> and (2) that the Supreme Court has not yet disagreed with *Carl Sandburg Village*.<sup>174</sup> Nevertheless, the majority

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<sup>168</sup> *Id.* (citing *Carl Sandburg Vill. Condo. Ass'n No. 1. v. First Condo Dev. Co.*, 758 F.2d 203, 207-08 (7th Cir. 1985)).

<sup>169</sup> *Reifert*, 450 F.3d at 317 (stating that "access to the multi-listing service cannot be obtained without purchasing the tied product, a Realtors Association membership," and that "SCWMLS has sufficient market power to restrain free competition").

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 316-17.

<sup>172</sup> *Id.* at 317 n.2.

<sup>173</sup> *Id.* (stating "the Supreme Court recently adopted Justice O'Connor's reasoning in *Jefferson Parish Hosp. Dist. No. 2* and held that tying arrangements involving patents should be evaluated based on their market power 'rather than under the *per se* rule'") (citing *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S.Ct. 1281, 1291 (2006)).

<sup>174</sup> *Reifert*, 450 F.3d at 317 n.2 (stating "[a]lthough the *per se* analysis of the *Jefferson Parish Hosp. Dist. No. 2* majority has not been expressly over-ruled, in the

does not get a chance to employ the economic interest factor in *Reifert* since it upholds summary judgment for the defendants due to the plaintiff's failure to plead that the arrangement forecloses a substantial volume of commerce in the tied service market.<sup>175</sup>

### C. Judge Wood's *Reifert* Concurrence

While Judge Wood agreed with the majority's conclusion in *Reifert*, she did not subscribe to the majority's use of the *Carl Sandburg Village* test.<sup>176</sup> She saw the *Carl Sandburg Village* test as ignoring the Supreme Court's *per se* approach in *Jefferson Parish*.<sup>177</sup> Judge Wood held strong to the majority opinion in *Jefferson Parish*, noting that it explained the *per se* test for tying, and that the Supreme Court has not backtracked from its holding despite a very recent opportunity to do so.<sup>178</sup> She further explained that according to *Jefferson Parish*, *per se* treatment is appropriate where forcing<sup>179</sup> is probable, and forcing is probable if a substantial volume of commerce is foreclosed by the arrangement and it is probable that the seller has market power in the tying product.<sup>180</sup>

In refusing to acquiesce to the majority's *Carl Sandburg Village* test, Judge Wood approved of the test propounded by the D.C. Circuit

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intervening twenty-one years since *Carl Sandburg Vill. Condo Ass'n No. 1*, the Supreme Court has not found occasion to disagree with this Circuit's approach").

<sup>175</sup> *Id.* at 320 (explaining that because the plaintiff failed to meet the third requirement, the court need not "address whether SCWMLS has a sufficient economic interest in the sales of the tied product to satisfy the fourth element of an unlawful tying arrangement").

<sup>176</sup> *Id.* at 323 (Wood, J. concurring).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 322-23 (explaining the recent *Ill. Tool Works* decision: "*Illinois Tool Works* . . . stands only for the proposition that a plaintiff must prove that a holder of intellectual property has 'either the degree or the kind of market power that enables him to force customers' to purchase the tied product," and if a plaintiff can, "then the framework established by *Jefferson Parish* continues to apply).

<sup>179</sup> See note 93, *supra*.

<sup>180</sup> *Reifert*, 450 F.3d at 322 (Wood, J. concurring); see *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-19 (1984).

in *United States v. Microsoft Corp.*<sup>181</sup> This test sets forth four elements to a *per se* tying violation: (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it (i.e. a tie actually exists); and (4) the tying arrangement forecloses a substantial volume of commerce.<sup>182</sup> Noticeably absent from the foregoing is any semblance of the economic interest requirement from *Carl Sandburg Village*. Using this test, Judge Wood still agreed with the majority that the plaintiff's claim failed because he did not offer evidence of any foreclosure of commerce by the tying arrangement.<sup>183</sup> Specifically, Judge Wood explained that according to the record "no one refrained from joining any other organization because of the cost of membership" in RASCW, and therefore the plaintiff's tying claim fails.<sup>184</sup>

In the concurrence's final paragraph, Judge Wood succinctly restates her position on the majority's tying arrangement analysis.<sup>185</sup> She summarizes:

Analytically, the majority may well be right that the rule of reason approach it sees in [*Carl Sandburg Village*] [citation omitted] would be a more sensible way to approach all tying cases. But it is not for this court to anticipate the Supreme Court's overruling of its earlier decisions, even if the passage of time and the impact of later cases that create doctrinal tensions are evident to all.<sup>186</sup>

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<sup>181</sup> 253 F.3d 34, 85 (D.C. Cir. 2001) (citing *Eastman Kodak v. Image Tech. Servs. Inc.* 504 U.S. 451, 461-62 (1992), and *Jefferson Parish*, 466 U.S. at 12-18 (1984)), *cert. denied*, 534 U.S. 932 (2001).

<sup>182</sup> *Reifert*, 450 F.3d at 323 (Wood, J. concurring).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

Judge Wood asserts that the Seventh Circuit should have limited itself “to pointing out the problems [it] see[s] and then attempting to apply the law as it stands,”<sup>187</sup> as the court did in *Khan v. State Oil Co.*<sup>188</sup> According to Judge Wood, the “law as it stands” forbids adding *Carl Sandburg Village*’s economic incentive requirement to the *Jefferson Parish per se* tying framework.<sup>189</sup>

### III. TYING ARRANGEMENTS AND THE ECONOMIC INCENTIVE REQUIREMENT

The disagreement between the majority and the concurrence in the Seventh Circuit’s *Reifert* decision exemplifies the difficulty the circuit courts have endured in applying the *per se* tying analysis. Differing views on *Jefferson Parish*’s policy and its stated *per se* analysis have polarized the proponents and critics of the economic interest requirement.

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<sup>187</sup> *Id.*

<sup>188</sup> In *Khan v. State Oil Co.*, the Seventh Circuit applied the *per se* rule to vertical maximum price fixing pursuant to the then-authoritative Supreme Court case law despite its “increasingly wobbly, moth-eaten foundations” because “the Supreme Court has told the lower federal courts, in increasingly emphatic, even strident, terms, not to anticipate an overruling of a decision by the Court.” 93 F.3d 1358, 1363, 1366 (7th Cir. 1996), *rev’d on other grounds*, *State Oil v. Khan*, 522 U.S. 3 (1997).

The Supreme Court granted certiorari and unanimously decided to change the law because of the well-reasoned attacks against the *per se* standard for vertical maximum price fixing. *State Oil*, 522 U.S. at 7. Notably the Supreme Court praised the Seventh Circuit’s treatment of the case, stating “[t]he Court of Appeals was correct in applying [*stare decisis*] despite disagreement with [previous Supreme Court case law], for it is this Court’s prerogative alone to overrule one of its precedents.” *Id.* at 20.

<sup>189</sup> *Reifert*, 450 F.3d at 323 (Wood, J. concurring).

*A. The Construction and Justification of the Economic Interest Requirement*

As stated above, certain circuits, including the Seventh Circuit, have used the economic interest requirement in assessing tying arrangements under the *per se* analysis.<sup>190</sup> The policy justification for this requirement is that “when the seller of the tying goods has no interest in the sale of the tied product, he is not using his power in the tying product market to invade a second market.”<sup>191</sup> Therefore, courts using the factor reason that the absence of a tying seller’s economic interest in the tied product indicates that the agreement “ha[s] no anti-competitive impact upon the market for the tied product or service.”<sup>192</sup>

The *Carl Sandburg Village* court attempted to clarify what constitutes an economic interest in the tied market.<sup>193</sup> The Seventh Circuit stated that a tying seller’s economic interest in the sales of the tied product does not have to be direct in the sense that the seller of the tying product also produces the tied product; the tying seller must simply have some form of interest in the sale of the tied product, “such as the receipt of a commission or rebate.”<sup>194</sup> However, Judge Flaum also recognized that “the economic interest requirement is not met where a plaintiff merely alleges that the tying seller is receiving substantial revenue as a result of his sale of two products as a package.”<sup>195</sup> The plaintiff in *Carl Sandburg Village* pled that the tying seller realized economic benefit because the tied seller concealed

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<sup>190</sup> See *Abraham v. Intermountain Health Care, Inc.*, 461 F.3d 1249 (10th Cir. 2006); *James B. Beard v. Parkview Hosp.*, 912 F.2d 138 (6th Cir. 1990); *Carl Sandburg Vill. Condo. Ass’n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203 (7th Cir. 1985).

<sup>191</sup> *Carl Sandburg Vill.*, 758 F.2d at 208; see also 9 AREEDA & HOVENKAMP, *supra* note 15, ¶ 1709e5 (stating that a tying seller “who lacks an economic interest in the tied market can hardly gain incremental revenue or exploit his customers in any additional way when it takes nothing from the seller of the second product”).

<sup>192</sup> *Beard*, 912 F.2d at 141.

<sup>193</sup> *Carl Sandburg Vill.*, 758 F.2d at 208.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

defects in condominiums, thereby allowing the tying seller to sell more condominiums at a higher price.<sup>196</sup> According to the Seventh Circuit, this benefit did not comply with the definition of an “economic benefit,”<sup>197</sup> thus the plaintiff’s complaint was deficient and dismissal was proper.<sup>198</sup>

The Sixth Circuit has perhaps been the most vehement defender of the economic interest requirement. In *Beard v. Parkview Hospital*, the Sixth Circuit upheld a tying arrangement on the grounds that the defendant received no direct economic benefit from the provider of the tied service.<sup>199</sup> The court used this opportunity to contend that requiring a plaintiff to show an economic interest in order to condemn a tying arrangement as illegal *per se* is consistent with the *Jefferson Parish* holding.<sup>200</sup>

In *Beard*, the Sixth Circuit states that it is “unpersuaded that the ‘direct economic benefit’ requirement . . . has been displaced” by *Jefferson Parish*.<sup>201</sup> It necessarily recognized that the *Jefferson Parish* majority “did not state that the seller of a tying product or service must secure a direct economic benefit from sales of a tied product or service” for *per se* illegality of a tying violation.<sup>202</sup> However, the court contended that since the *Jefferson Parish* decision was premised on an absence of market power in the tying service, its silence on the economic interest requirement should not be construed as disapproval

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 209 (stating that “a plaintiff must show that the tying arrangement involves a seller who competes in the tying product’s line of commerce as well as participates for profit in the tied product market”) (citing *Rodrigue v. Chrysler Corp.*, 421 F. Supp. 903 (E.D. La. 1976)).

<sup>198</sup> *Carl Sandburg Vill.*, 758 F.2d at 209.

<sup>199</sup> 912 F.2d 138, 144 (6th Cir. 1990). The tying arrangement in *Beard* involved an agreement whereby patients receiving care at a hospital (the tying service) could only use radiologists from a single radiology firm (the tied service). *Id.* at 139.

<sup>200</sup> *Id.* at 141-43.

<sup>201</sup> *Id.* at 142.

<sup>202</sup> *Id.*



of the requirement.<sup>203</sup> It also stated that, while *Jefferson Parish* did not list the economic interest requirement as a part of the *per se* test, the requirement is “consistent with the Court’s explanation of what an illegal tying arrangement is.”<sup>204</sup> The *Beard* court alleges that the Supreme Court’s condemnation of the use of power in the tying market to impair competition in the tied market leads to the conclusion that arrangements where the tying seller has no economic interest in the tied market are harmless because the tying seller “is not attempting to invade the alleged tied product or service market.”<sup>205</sup> The Sixth Circuit concluded by rejecting a contrary construction of *Jefferson Parish* from the Second Circuit<sup>206</sup> and upholding the tying arrangement because the plaintiff failed to satisfy the economic interest requirement.<sup>207</sup>

Several erudite antitrust scholars also favor the economic interest requirement, and offer compelling economic justifications for its implementation.<sup>208</sup> Professors Phillip E. Areeda and Herbert Hovenkamp argue that “[a]llowing the allegedly tied customers to obtain the tied product from suppliers in which the defendant has no financial interest ends most or all of the fears underlying the *per se* rule against tying.”<sup>209</sup> These fears are allayed in the absence of a tying seller’s economic interest in the tied market for four reasons: (1) the defendant cannot gain power in the tied market by requiring customers to patronize unrelated firms there; (2) giving the tied firm the ability to charge supra-competitive prices in the tied market would normally injure the tying firm (because customers would be less inclined to

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.* (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14-15 (1984) “if [market power in the tying market] is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures”).

<sup>205</sup> *Beard*, 912 F.2d at 142.

<sup>206</sup> *Gonzalez v. St. Margaret’s House Hous. Dev. Fund Corp.*, 880 F.2d 1514 (2d Cir. 1989).

<sup>207</sup> *Beard*, 912 F.2d at 143.

<sup>208</sup> 9 AREEDA & HOVENKAMP, *supra* note 15, ¶ 1726d.

<sup>209</sup> *Id.* at ¶ 1726a.

participate in the agreement and purchase the tying product); (3) exploitation of power over the tying product (such as price discrimination) cannot result from the arrangement if the defendant receives no portion of the revenues from the tied product; and (4) once the three preceding functions of tying arrangements are put aside, the alleged tie-in is likely to be pro-competitive in both motivation and effect.<sup>210</sup>

*B. Attacks Against the Economic Interest Requirement's  
Implementation in the Per Se Tying Analysis*

The economic interest requirement has fallen into disfavor among some courts and scholars since the *Jefferson Parish* opinion.<sup>211</sup> Even the Seventh Circuit, who favored the inquiry in *Carl Sandburg Village*, and in the majority of its recent decision in *Reifert*, has voiced disapproval of the requirement's use in the *per se* tying analysis.<sup>212</sup> Opponents of the economic interest requirement's implementation in the *per se* tying analysis express that the *Jefferson Parish* majority "focused primarily on the anticompetitive effect of tying arrangements and the resultant harm to consumer choice in the tied-product market,"<sup>213</sup> and that the predatory aspects of a tie (the invasion of the tied market by the tying seller, as explained in *Carl Sandburg Village*)<sup>214</sup> are not the sole reason for their condemnation.<sup>215</sup>

Judge Wood explained in her *Reifert* concurrence that the *Jefferson Parish* majority held that a tying arrangement with two different products is illegal *per se* where "a substantial volume of

<sup>210</sup> 9 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1726a (1991).

<sup>211</sup> See, e.g., *Gonzalez*, 880 F.2d at 1514; *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712 (7th Cir. 1987); Young, *supra* note 123; Warren S. Grimes, *Antitrust Tie-In Analysis After Kodak: Understanding the Role of Market Imperfections*, 62 ANTITRUST L.J. 263 (1994).

<sup>212</sup> *Parts & Elec. Motors*, 826 F.2d at 712.

<sup>213</sup> *Gonzalez*, 880 F.2d at 1517.

<sup>214</sup> See *Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203, 208 (7th Cir. 1985).

<sup>215</sup> Young, *supra* note 123, at 1365.

commerce is foreclosed by the arrangement,” and where the “seller [of the tying product] has market power.”<sup>216</sup> On these grounds, she objected to the *Reifert* majority’s use of the economic interest factor as “anticipat[ing] the Supreme Court’s overruling of its earlier decisions” by adding another requirement to the *per se* tying analysis.<sup>217</sup> While Judge Wood admits that the test the majority applies may “be a more sensible way to approach all tying cases,” she refuses to accede to the test and instead opts to “take a more cautious approach, and leave further developments in tying law to the high court.”<sup>218</sup>

Judge Wood’s concurring opinion in *Reifert* did not mark the first time the Seventh Circuit disapproved of the economic interest requirement’s implementation in the *per se* tying analysis. It expressed doubt in the requirement’s relevance to the *Jefferson Parish per se* tying analysis in *P&E*.<sup>219</sup> The court recognized that *Jefferson Parish* controls *Carl Sandburg Village* (decided two years prior to *P&E*), and examined Justice Stevens’ *Jefferson Parish* majority opinion in-depth to determine whether the holding endorsed the economic interest requirement approved by the Seventh Circuit in *Carl Sandburg Village*.<sup>220</sup> Conversely, the *Carl Sandburg Village* opinion cited only Justice O’Connor’s *Jefferson Parish* concurrence in asserting that “[o]ne of the threshold criteria that a plaintiff must satisfy under . . . the *per se* . . . analys[is] . . . is that there is a substantial danger that the tying seller will acquire market power in the tied product market.”<sup>221</sup>

In *P&E*, the Seventh Circuit noted that the *Jefferson Parish* majority quoted Justice White’s dissent in *Fortner I* with approval: “[t]he tying seller may be working toward a monopoly position in the tied product and, *even if he is not*, the practice of tying forecloses other

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<sup>216</sup> *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 322 (7th Cir. 2006) (Wood, J. concurring).

<sup>217</sup> *Id.* at 323.

<sup>218</sup> *Id.* at 321-323.

<sup>219</sup> *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712 (7th Cir. 1987).

<sup>220</sup> *Id.* at 718.

<sup>221</sup> *Carl Sandburg Vill. Condo. Ass’n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203, 210 (7th Cir. 1985).

sellers of the tied product and makes it more difficult for new firms to enter that market.”<sup>222</sup> It used this language to explain that Justice Stevens’ opinion “does not seem to suggest any role for the threat of market power in the tied product market as a factor in the [*per se* tying] analysis.”<sup>223</sup> While the *P&E* court conducted the Seventh Circuit’s most thorough analysis of the economic interest requirement’s place under the *Jefferson Parish* majority’s opinion, it specifically designated its analysis as mere dicta.<sup>224</sup>

However, the Second Circuit approved of the Seventh Circuit’s dicta in *P&E*, and expressly adopted it in its holding in *Gonzalez*.<sup>225</sup> This court agreed with the Seventh Circuit in *P&E* that the Supreme Court has not yet “cut back on the application of tie-in doctrine by incorporating [the economic interest] requirement into the test for an illegal tying arrangement.”<sup>226</sup> For this reason, the *Gonzalez* court explicitly held that “[t]he majority in *Jefferson Parish* does not require any ‘economic interest’ by the tying seller in the tied-product market.”<sup>227</sup>

<sup>222</sup> *Parts & Elec. Motors*, 826 F.2d at 718 (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13 n.19 (1984) (quoting *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 513 (1969) (White, J. dissenting)) (emphasis added in *P&E*).

<sup>223</sup> *Parts & Elec. Motors*, 826 F.2d at 718.

<sup>224</sup> *Id.* at 719 (stating “whatever the law may be or ought to become, in this case the question is moot since the issue of threatened market power in the tied product market was waived by [the defendant]”).

<sup>225</sup> *Gonzalez v. St. Margaret’s House Hous. Dev. Fund Corp.*, 880 F.2d 1514, 1517 (2d Cir. 1989).

<sup>226</sup> *Id.* (citing *Parts & Elec. Motors*, 826 F.2d at 718 n.5); see also Gordon B. Spivack and Carolyn T. Ellis, *Kodak: Enlightened Antitrust Analysis and Traditional Tying Law*, 62 ANTITRUST L.J. 203, n.34 (1993) (explaining that the Supreme Court in *Kodak v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992), by reaffirming the *Jefferson Parish per se* tying inquiry, “imposed no requirement that the plaintiff prove that market power in the tied product results, or is likely to result from the tie”).

<sup>227</sup> *Gonzalez*, 880 F.2d at 1517. This court concluded by expressing that the *per se* tying analysis has “weaknesses” and that it is “virtually certain” that the agreement at issue “would survive scrutiny” under the rule of reason; nevertheless

While the foregoing arguments against the economic interest requirement mainly address its *propriety* in the *Jefferson Parish per se* framework, its *effectiveness* in a *per se* tying analysis has also been questioned by several commentators.<sup>228</sup> One commentator contends both that the requirement has no place under the *Jefferson Parish* framework and that it is irrelevant to the *per se* structure.<sup>229</sup> Under this commentator's analysis, "all ties restrict the freedom of tied-product buyers to purchase products based on the merits of that product, resulting in a lessening of competition in the tied product market," and the "economic interest requirement ignores these effects."<sup>230</sup> He concludes that the critical question is the degree of foreclosure in the tied market, "not the tying seller's motivation for imposing the tie."<sup>231</sup>

Practical litigation concerns prompted another commentator to criticize the economic interest requirement.<sup>232</sup> According to this commentator, effectively "tracing the financial links" between certain types of entities<sup>233</sup> may prove virtually impossible for a plaintiff.<sup>234</sup> According to him, such a task "should be wholly unnecessary if the elements of a harmful tie have been demonstrated."<sup>235</sup>

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the court acknowledged that it "must, of course, adhere to the views of a majority of the Supreme Court." *Id.* at 1519.

<sup>228</sup> Young, *supra* note 123; Grimes, *supra* note 211.

<sup>229</sup> Young, *supra* note 123

<sup>230</sup> *Id.* at 1365-66.

<sup>231</sup> *Id.* at 1368.

<sup>232</sup> Grimes, *supra* note 211.

<sup>233</sup> *Id.* at 318. Specifically, the author of this article references separate subsidiaries of a parent corporation. *See* Grimes, *supra* note 211.

<sup>234</sup> Grimes, *supra* note 211, at 318.

<sup>235</sup> *Id.*; *see also* Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co., 758 F.2d 203, 209 (7th Cir. 1985) (acknowledging that "it might be difficult for a plaintiff to allege the economic interest element in a case of secret rebates or discounts where the plaintiff has not had the benefit of discovery").

### C. The Economic Interest Requirement Controversy in *Reifert*

However well-justified the policy considerations favoring the economic interest requirement may be, the circuit courts must remember that the *Jefferson Parish* majority's *per se* analysis continues to dictate the legality of tying arrangements. Resultantly, the Seventh Circuit's stated analysis of the tying arrangement in *Reifert* was incorrect. While the outcome of the case was unaffected by the *Reifert* majority's error,<sup>236</sup> Judge Wood's more conservative concurrence correctly stated the application of existing Supreme Court precedent.

As discussed above, *Jefferson Parish* explicitly stated that a tying arrangement involving two separate products or services is illegal *per se* where the tying seller has market power, and a substantial amount of commerce is affected.<sup>237</sup> The Court favored the idea that even if a tying seller is not working toward a monopoly position in the tied market, tying arrangements still have anticompetitive consequences by foreclosing other sellers of the tied product from the tied product market.<sup>238</sup> Leading up to *Jefferson Parish*, a body of circuit-court case law grew favoring the economic interest requirement in the *per se* tying analysis; but the Court in *Jefferson Parish*, while not explicitly addressing the economic interest requirement, "refocused the inquiry" on the degree of foreclosure of commerce (as an anticompetitive effect) in the tied market, "rather than on the tying seller's motivation to invade a second market."<sup>239</sup> The Seventh Circuit itself observed that *Jefferson Parish* "does not seem to suggest any role" for the

<sup>236</sup> *Reifert v. S. Cent. Wis. MLS*, 450 F.3d 312, 320 (7th Cir. 2006) (the case's dismissal for failure to show foreclosure in the tied product market made it unnecessary for the majority to address whether the defendant had "a sufficient economic interest in the sales of the tied product to satisfy the [economic interest requirement]").

<sup>237</sup> *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16-17 (1984).

<sup>238</sup> *Id.* at 13 n.19 (quoting *Fortner Enter. v. United States Steel Corp.*, 394 U.S. 495, 513 (1969) (White, J. dissenting)).

<sup>239</sup> Young, *supra* note 123, at 1367.

motivation of the tying seller to gain market power in the tied product market as a factor in the *per se* tying analysis.<sup>240</sup>

Nevertheless, Judge Flaum, citing the *Carl Sandburg Village* decision that he penned in 1985, reasserted the economic interest requirement in *Reifert*. Judge Wood correctly noted that this aspect of the *Reifert* opinion is in “tension with the governing Supreme Court doctrine.”<sup>241</sup> As stated in Section II, the *Reifert* concurrence’s “more cautious approach,” which omitted the economic interest requirement and mirrored the tying analysis expressed in *Jefferson Parish*, warranted the same result as the majority.<sup>242</sup> The majority and concurring opinions in the *Reifert* case differed in that the concurrence remained faithful to the Supreme Court’s instruction to the circuit courts “not to anticipate an overruling of a decision by the Court.”<sup>243</sup>

While the economic interest requirement referenced by the *Reifert* majority may assist in determining the likelihood that the tying seller is attempting to parlay market power in the tying market into market power in the tied market, this inquiry has no place in the *Jefferson Parish per se* tying analysis. Because the Supreme Court has never recognized the economic interest requirement as a prerequisite in the *per se* tying analysis, I would join in Judge Wood’s concurrence wherein she applied the *Jefferson Parish per se* standard to reach her holding, but also expressed doubt in the effectiveness of the analysis.

#### IV. THE FUTURE OF THE *PER SE* TYING ANALYSIS

The turmoil and tumult created by the *per se* tying analysis is obvious through the divided reasoning between *Reifert*’s majority and

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<sup>240</sup> *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 826 F.2d 712, 718 (7th Cir. 1987).

<sup>241</sup> *Reifert* 450 F.3d at 321 (Wood, J. concurring).

<sup>242</sup> *Id.* at 321-23.

<sup>243</sup> *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996), *rev’d on other grounds*, *State Oil v. Khan*, 522 U.S. 3, 20 (1997) (stating “[t]he Court of Appeals was correct in applying [*stare decisis*] despite disagreement with [previous Supreme Court case law], for it is this Court’s prerogative alone to overrule one of its precedents”).

concurring opinions. Moreover, the circuits' argument regarding the economic interest requirement's applicability bespeaks a problem with the *per se* tying analysis itself. Judge Flaum, writing the *Reifert* majority opinion, observed that while the Supreme Court has never expressly overruled the *per se* tying test evinced in *Jefferson Parish*, it recently adopted Justice O'Connor's reasoning (from her *Jefferson Parish* concurrence) with respect to tying arrangements involving patents.<sup>244</sup> Justice O'Connor's call to jettison the *per se* standard for tying arrangements has been endorsed as sound policy by scholars and judges.<sup>245</sup> Even Judge Wood, in her *Reifert* concurrence, speculated that a rule of reason analysis may "be a more sensible way to approach all tying cases."<sup>246</sup>

Antitrust law's *per se* analysis is beneficial in that it provides clarity and simplicity to courts assessing firms' commercial behavior.<sup>247</sup> To effectuate this end, *per se* illegality eliminates an in-depth market analysis as to the motivations of anticompetitive behavior and a balancing of the positive and negative effects of such behavior.<sup>248</sup> Therefore, it is reserved for agreements or actions deemed so anticompetitive that they warrant a presumption of illegality regardless of their actual effects.<sup>249</sup>

The *per se* tying analysis fails in providing clarity and simplicity to courts assessing tying arrangements.<sup>250</sup> The market power requirement creates an inherent difficulty for courts.<sup>251</sup> Uncertainty

<sup>244</sup> *Reifert*, 450 F.3d at 317 n.2 (citing *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 126 S.Ct. 1281 (2006)). In *Ill. Tool Works*, the Supreme Court held that existence of a patent on the tying product does not automatically infer sufficient market power in the tying market. 126 S.Ct. 1281.

<sup>245</sup> See *supra* note 107.

<sup>246</sup> *Reifert* 450 F.3d at 323 (Wood, J. concurring).

<sup>247</sup> Phillip Areeda, *Excerpts from National Institute on Litigating "Rule of Reason" Cases: The Rule of Reason – A Catechism on Competition*, 55 ANTITRUST L.J. 571 (1986).

<sup>248</sup> *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 10 (1984).

<sup>249</sup> *Id.*

<sup>250</sup> 9 AREEDA & HOVENKAMP, *supra* note 15, ¶ 1730b.

<sup>251</sup> *Id.*



about market definition,<sup>252</sup> the importance of intellectual property,<sup>253</sup> and the importance of market imperfections<sup>254</sup> have clouded the clarity of the *per se* tying analysis. The separate product requirement has also created confusion, and has “become highly indeterminate and often metaphysical.”<sup>255</sup> Resultantly, Justice O’Connor was quite justified in contending that “tying doctrine incurs the costs of a rule-of-reason approach without achieving its benefits: the doctrine calls for the extensive and time-consuming economic analysis characteristic of the rule of reason, but then may be interpreted to prohibit arrangements that economic analysis would show to be beneficial.”<sup>256</sup>

Additionally, a more extensive economic understanding of tying arrangements shows that they are capable of many procompetitive effects.<sup>257</sup> Among these redeeming characteristics are (1) the protection of product quality, (2) the lowering of production costs, (3) the increase of competition through indirect price cuts, and (4) the easing of entry into new markets.<sup>258</sup> A tying arrangement can protect a product’s quality by ensuring that the necessary supplies or repairs are provided or performed exclusively by the defendant.<sup>259</sup> Moreover, selling or producing two products together can reduce a seller’s costs, and this reduction may be passed on to the consumer.<sup>260</sup> Producers may also combine two products and sell them for less than the sum of

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<sup>252</sup> *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 480 (3d Cir. 1992).

<sup>253</sup> *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 126 S.Ct. 1281 (2006).

<sup>254</sup> *Compare Jefferson Parish*, 466 U.S. at 27 (stating that market imperfections “do not generate the kind of market power that justifies condemnation of tying”), *with Eastman Kodak v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992) (finding market power from market imperfections).

<sup>255</sup> 9 AREEDA & HOVENKAMP, *supra* note 15, ¶ 1730b.

<sup>256</sup> *Jefferson Parish*, 466 U.S. 2 at 34 (O’Connor, J. concurring).

<sup>257</sup> 9 AREEDA & HOVENKAMP, *supra* note 15, ¶ 1703g.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*; *but see Int’l Salt Co. v. United States*, 332 U.S. 392 (1947) (arguing that this goal can be accomplished just as easily by informing the consumer of the necessary procedures to maintain the quality of the tying product).

<sup>260</sup> 9 AREEDA & HOVENKAMP, *supra* note 15, ¶ 1703g.

the price of each individual product; while rival firms may object to this tactic, consumers will realize a benefit in a lower purchase price.<sup>261</sup> Further, a tie can guarantee a seller a certain volume of patronage upon entering a new market.<sup>262</sup> Again, while competitors in the tied market may object to the tie, it would be procompetitive in the tied market (as long as it does not foreclose a large portion of the tied market) even if the tying seller had a monopoly in the tying market.<sup>263</sup>

Today's understanding of tying arrangements would presumably lead to a rule of reason approach in the absence of existing Supreme Court precedent.<sup>264</sup> However, the expansive body of Supreme Court case law examined in Part I requires today's courts to apply *stare decisis*.<sup>265</sup> While the importance of the doctrine of *stare decisis* in American jurisprudence cannot be overstated,<sup>266</sup> it is "not an inexorable command."<sup>267</sup> The Supreme Court has explained that it will detour from the *stare decisis* path only for articulable reasons, and where the Court must bring its opinions into agreement with its experience and newly ascertained facts.<sup>268</sup>

In his later years, Thomas Jefferson remarked that while "frequent and untried changes in laws" are ill-advised, laws "must go hand in hand with the progress of the human mind," and "[a]s [the mind]

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<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> See *id.* at ¶ 1730c ("The reasons [favoring a rule of reason analysis] are so forceful that one doubts that the courts, were they writing on a clean slate today, would create the peculiar per se rule of today's tying cases").

<sup>265</sup> Literally translated from Latin as "to stand by things decided," this doctrine requires courts to follow earlier judicial decisions when the same points arise again in litigation. BLACK'S LAW DICTIONARY 1443 (8th ed. 2004).

<sup>266</sup> *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (stating that the doctrine "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact").

<sup>267</sup> *Id.* at 266.

<sup>268</sup> *Id.* (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J. dissenting)).

becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.”<sup>269</sup> In light of the current understanding of tying arrangements, I believe that we should abolish the *per se* tying standard. It eliminates the necessity of an inquiry into the arrangement’s effects (some of which may benefit consumers), and fails to create clarity and simplicity in assessing tying arrangements. Thusly, the *per se* standard, as applied to tying arrangements, has “most of the disadvantages of the standard rule of reason, without the advantages of either” the rule of reason or the *per se* analysis.<sup>270</sup> Further, I surmise that the *per se* analysis will one day be renounced by the Supreme Court in favor of a rule of reason approach; this change will be justified by the continuing difficulties the *per se* analysis imposes on the courts, and the well-reasoned criticism of its implementation.<sup>271</sup>

### CONCLUSION

While prevailing opinion on the evils of tying arrangements has changed since the early days of the Supreme Court’s *per se* stance,<sup>272</sup> the *per se* analysis from the *Jefferson Parish* majority continues to dictate the legality of tying arrangements.<sup>273</sup> The Court will likely

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<sup>269</sup> Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) (on file with the Library of Congress).

<sup>270</sup> 9 AREEDA & HOVENKAMP, *supra* note 15, ¶ 1730b.

<sup>271</sup> See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 33-47 (O’Connor, J. concurring); *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312 (7th Cir. 2006); 9 AREEDA & HOVENKAMP, *supra* note 15, ¶ 1730b.

<sup>272</sup> Compare *Standard Oil Co. v. United States* 337 U.S. 293, 305 (1949) (stating that “tying agreements serve hardly any purpose beyond the suppression of competition”), with *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 126 S.Ct. 1281, 1292 (2006) (explaining that “[m]any tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market”).

<sup>273</sup> *Ill. Tool Works*, 126 S.Ct. at 1291 (endorsing the *Jefferson Parish* majority’s tying framework).

someday recognize that changes in policy considerations and economic theory favor moving from the *per se* standard in assessing tying arrangements to a rule of reason inquiry; but until that day arrives, the circuit courts must implement the *per se* analysis evinced in *Jefferson Parish*. Consequently, the *Reifert* majority's failure to operate within the existing Supreme Court doctrine was correctly criticized by Judge Wood in her concurrence.

The Seventh Circuit's approval of the economic interest factor added another prerequisite to liability under the Supreme Court's *per se* tying analysis. It is the Supreme Court's decision alone<sup>274</sup> whether to relax the *per se* noose around tying arrangements by adding more prerequisites to the analysis, or whether to untie the noose all together by abolishing the *per se* analysis in favor of a rule of reason approach. Although the *Reifert* holding was not affected by the majority's error, its analysis anticipated the overruling of existing Supreme Court precedent, and as a result improperly included the economic interest factor in its *per se* tying analysis.

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<sup>274</sup> State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).